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SHARING FINANCIAL LOSSES AS WELL AS GAINS ON DIVORCE

Gillian Douglas*

ABSTRACT

Financial remedies law in England and Wales is generally regarded as in need of fundamental reform. The development of the case law underpinning the statutory regime has become increasingly skewed by the prevalence of 'big money' cases. A law which is concerned only with uber-rich couples is a kind of fantasy family law of increasing irrelevance to the needs of those at the other end (or even in the middle) of the financial spectrum. But the current English law of open-ended discretion cannot meet the needs of the non-rich in a system that no longer attempts to provide affordable access to dispute resolution mechanisms intended to ensure fair outcomes.

I suggest that any reform of the law of financial remedies on divorce could usefully start by elucidating a modern conception of marriage, as not (just) a partnership of two equals, but as a joint enterprise. Drawing on a range of economic and social factors applying to families in England and Wales, I contend that in designing such a law, reform proposals should consider a focus at least as much on how to bear the losses of marriage as on how to share the gains.

INTRODUCTION

In this paper, I argue that the financial remedies law of England and Wales has ceased to be useful as a guide to couples seeking to achieve fair financial settlements on divorce, and that the time has come to jettison the open discretion provided in the Matrimonial Causes Act 1973. Adopting Lady Hale's view, set out in *Miller v Miller; McFarlane v McFarlane* that the goal of the law should be to provide the parties with 'an equal start on the road to independent

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living’,¹ I suggest that a potential avenue for reform would be to pay less attention to sharing the gains the parties have enjoyed (eg the accumulation of capital or the rise in earning capacity over time) and to pay more to ensuring that the losses (the loss of the marital home, the loss of access to a pension, etc) caused by the ending of the relationship are borne fairly. For many, perhaps most divorcing couples, divorce is, after all, about coping with a lower standard of living than before, rather than working out how to continue to enjoy a high one. I discuss some of the key losses which ought to be compensated as far as possible and suggest that their quantification requires that we take proper account of economic and social data concerning work, income and wealth as these are distributed across genders and across socio-economic groups, in order to arrive at what will be generally understood as a fair outcome on divorce. Such data are well-known, yet the messages of those data appear too often to be ignored when it comes to considering either how the current law can be expected to work effectively in practice, or how it might best be reformed.

As a brief prelude to the argument, it is necessary to explain that, on a divorce, the Matrimonial Causes Act 1973 vests extensive powers in the court, to transfer, or vary the interest in, or order the sale of, any item of property owned by either spouse,² and to order the payment of periodical payments, either open-ended or fixed-term, or of a lump sum, to the other spouse. The court chooses how to exercise these powers guided by statutory directions to give first consideration to the welfare while a minor any child of the family, and to consider whether it would be appropriate to impose either an immediate or deferred clean break on the parties, as well as to have regard to a checklist of factors,³ all subject to an overriding requirement laid down by the House of Lords in *White v White* to produce an outcome that is ‘fair’.⁴ The meaning of ‘fairness’ was explained by Lord Nicholls in that case as first, ensuring that ‘there is no place for

¹ *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 (hereafter *Miller; McFarlane*) at [144], emphasis added.

² Matrimonial Causes Act 1973, Part II, as amended. For consideration of how the courts have sought to distinguish between ‘matrimonial’ and ‘non-matrimonial’ property in order to shield a party’s assets from redistribution, see N Lowe and G Douglas, *Bromley’s Family Law* (11th edn, Oxford UP, 2015) pp 882-886.

³ Matrimonial Causes Act 1973 s 25, as amended, and s 25A.

⁴ *White v White* [2001] 1 AC 596, HL.

discrimination between husband and wife and their respective roles ... If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets.’⁵ Secondly, it followed from that principle of non-discrimination that a ‘yardstick’ of equality of division of the assets should be departed from ‘only if, and to the extent that, there is good reason for doing so’.⁶

Further guidance on what is ‘fair’ was elaborated in the later decision of the House of Lords in *Miller; McFarlane*. There, they elucidated three key principles or rationales for the reallocation of resources on divorce: meeting of needs, compensation for relationship-related disadvantage, and sharing the fruits of the matrimonial partnership.⁷ Where there is more wealth in the marriage than is required to meet needs, then in considering how that surplus should be divided, they made clear that there is room to ring-fence (or share unequally) property which one spouses has brought into the marriage, or acquired unilaterally during it (such as by gift or inheritance) in order to recognise that additional ‘contribution’.⁸ But beyond these generalised points of principle, the courts and parties negotiating to reach a settlement, with or increasingly without the help of lawyers, have little by way of concrete guidance as to the approach they should take and the kind of outcome that they should aim for.

In practice, for what Emma Hitchings has termed the ‘everyday’ divorce case,⁹ it will usually be impossible to do more than attempt to deal with the first of the *Miller; McFarlane* principles – meeting needs – and doing so provides the ‘good reason’ for abandoning the ‘yardstick’ or principle of dividing assets equally. There is simply insufficient wealth, in the form of either capital or income, for the parties, their lawyers or the court to do more than attempt to meet their basic needs for accommodation and some help with living expenses for them and any dependent children. Indeed, a potentially very *unequal* division will be required

⁵ At p 599 et seq.

⁶ At 615.

⁷ *Miller; McFarlane* above, n 1 at [11]-[16] (Lord Nicholls) and [138]-[141] (Baroness Hale).

⁸ *Ibid*, at [21]-[25] (Lord Nicholls) and [147]-[153] (Baroness Hale).

⁹ E Hitchings, ‘The impact of recent ancillary relief jurisprudence in the ‘everyday’ ancillary relief case’ [2010] *CFLQ* 93.

in order to find an outcome that best meets at least the parties' most pressing needs,¹⁰ and in an unknown number of cases, the level of debt may well exceed assets. These cases, which are likely to reflect the circumstances of the vast majority of divorcing couples, rarely feature in the law reports. There is no coherent body of case law, for example, exploring how, or how far, debts should be shared between the spouses.¹¹ Moreover, cases involving very limited, or no, wealth, may increasingly rarely come to the attention of the courts at all, now that legal aid has been withdrawn from most family matters in England and Wales.¹² Meanwhile, at the other extreme is the 'big money case' where the assets in dispute would enable the parties to go well beyond meeting their own and their children's 'needs', however generously calibrated.¹³ The wealth at stake, and the wherewithal to spend money on litigating its allocation on divorce, make this kind of case the business of the Family Division of the High Court and the appellate courts, of specialist legal assistance and, generally, of the specialist series of law reports. The result, I contend, is that the needs of the everyday divorcing couple are increasingly not just ignored but neglected, while the concerns of the top 10% or even 1% of the population, have come increasingly to dominate family jurisprudence.¹⁴

It is true that guidance judgments such as *White v White* or *Miller; McFarlane* can and do provide an important indication of how the law can be applied to current circumstances. Moreover, they can and do illuminate central questions regarding how 'fairness' is understood by the courts and practitioners. It could be argued, for example, that it is easier to demonstrate how far the law truly promotes a

¹⁰ See Hitchings, above n 9, especially p 100.

¹¹ Discussion of mortgage debt will fall within the determination of what is to happen to the former matrimonial home, while insolvency and bankruptcy law may impact on settlements and outcomes, but the courts have not developed a principled approach to assessing the spouses' post-divorce liability for debt.

¹² Legal Aid, Sentencing and Punishment of Offenders Act 2012 s 9 and Sch 1.

¹³ For examples of 'need' at this end of the spectrum, see *McCartney v McCartney* [2008] EWHC 401 (Fam), [2008] 1 FLR 1508, £25m to wife; *Juffali v Juffali* [2016] EWHC 1684 (Fam), [2017] 1 FLR 729, £62m to wife.

¹⁴ It may be noted that the President of the Family Division is establishing specialist financial remedies courts, and advocates greater reporting of 'small' or 'medium' money cases, in an effort to provide greater transparency and information on how cases are decided and greater consistency of approach across courts: see Sir James Munby P, '18th View from the President's Chambers: the on-going process of reform – Financial Remedies Courts' [2018] Fam Law 156.

commitment to non-discrimination and ‘equality’ between divorcing spouses when there *is* enough money to go round, than when there is not. *Lambert v Lambert*,¹⁵ for example, when the court declined to allow a husband to claim that his ‘stellar contribution’ as a successful businessman justified his retaining more than half of the marital assets, made it clear that half shares really could apply even in big money cases. And *Sharp v Sharp*,¹⁶ where the Court of Appeal held that ‘unilateral assets’, ie those generated by one party and held separately during the (short) marriage, are not subject to the sharing principle, has shown that the judiciary continue to struggle with a view of marriage as a true coming together of two parties in a *joint* enterprise as opposed to a limited partnership of ‘equals’ in form, but not in substance.¹⁷

But such cases shed no light on how the notion of equality should be translated to the everyday case and when judicial guidance is limited to the concerns of the wealthy, it becomes increasingly difficult to argue that we have a law that is capable of operating across the financial spectrum. It is not surprising that in such a situation, there have been calls in England and Wales to abandon the open discretionary regime of the Matrimonial Causes Act in favour of a more ‘modern’ approach, most notably through the introduction on several occasions into the House of Lords of the Divorce (Financial Provision) Bill by Baroness Deech. Her Bill would introduce a presumption of equal shares of the net marital assets, presumptively limit financial support to a five year maximum term and give binding legal effect to marital property agreements.¹⁸

Careful consideration of empirical evidence of the working of the jurisdiction, such as is provided by Miles and Hitchings,¹⁹ and by Woodward,²⁰ is needed if a reformed law is to address the problems of the current situation in a way that is practical, realistic and principled. The purpose of this paper is to suggest that

¹⁵ *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] 1 FLR 139.

¹⁶ *Sharp v Sharp* [2017] EWCA Civ 408, [2017] 2 FLR 1095.

¹⁷ See further below pp xx-xx.

¹⁸ https://publications.parliament.uk/pa/bills/lbill/2017-2019/0026/lbill_2017-20190026_en_2.htm#l1g1.

¹⁹ Joanna Miles and Emma Hitchings, in this special issue.

²⁰ H Woodward with M Sefton, *Pensions on Divorce: An Empirical Study* (2014).

such reform must take account of the nature of marriage in current society as set within the context of the current organisation of work and the economy. I suggest that this means it must go beyond the model of ‘fairness usually means equal shares’ set out by Lord Nicholls and which would become a very strong presumption in Baroness Deech’s Bill. Rather, it must seek to ensure to the parties a *substantively* equal start on their ‘road to independent living’.

THE PROBLEMS OF USING THE CURRENT LAW

The problems of using the current law fall into two main categories – economic, and legal.

Economic circumstances and gender

The Matrimonial Causes Act was based on the social attitudes and family practices of the 1960s,²¹ when the then newly-formed Law Commission made proposals to move away from purely fault-based divorce and when the ‘breadwinner/housewife’ model of marriage was still regarded as the desirable norm. It was only slightly amended in the 1980s,²² yet it continues to be applied to families formed in a new millennium shaped by very different conditions and behaviours.²³ There is now a significant gap between the reality of the continuing gendered organisation of work and childcare, and the rhetoric of co-parenting and equality. For, in England and Wales at least, women remain the primary carers of dependants whilst also increasingly being employed in the paid economy, working the ‘double shift’²⁴ and suffering resultant disadvantage both during their careers and on into retirement through poorer pensions. This

²¹ Law Commission, *Reform of the Grounds of Divorce: The Field of Choice* Cmnd 3123 (1966) followed by *Report on Financial Provision in Matrimonial Proceedings* LC No 25 (1969). The recommendations were enacted in the Matrimonial Proceedings and Property Act 1970 and consolidated in the Matrimonial Causes Act 1973, which remains in force.

²² The Law Commission made recommendations in the wake of strong protests, primarily from divorced husbands who resented supporting ‘guilty’ wives: see Law Commission, *The Financial Consequences of Divorce: The Basic Policy* LC No 103 (1980) and *The Financial Consequences of Divorce* LC No 112 (1981). The reforms were enacted by the Matrimonial and Family Proceedings Act 1984, amending the 1973 Act.

²³ For discussion of the changes to family composition and behaviour, see G Douglas, *Obligation and Commitment in Family Law* (Hart Publishing, 2018), ch 2.

²⁴ See J Scott and E Clery, ‘Gender Roles’ in A Park et al (eds) *British Social Attitudes 30* (2013); G Ellison et al, *Work and care: a study of modern parents*, Research Report : 15 (2009); D Ben-Galim and A Silim, *The Sandwich Generation: Older women balancing work and care* (2013).

should mean that the current law has remained relevant to the majority of divorcing couples in England and Wales who still, perforce, follow a version of the breadwinner/housewife model in organising their family life. But social and legal attitudes towards equality and self-sufficiency have changed since the 1970s perhaps precisely because of the substantial growth in the proportion of married women working (albeit many on a part-time basis). For example, from a 40-point gap in the 1970s, there is now only a 10-point difference between men's and women's employment rates in the UK.²⁵ The rise amongst women is mainly due to more women remaining in employment until their first child is born, and many more returning to work after.²⁶ These increases, and the influence of liberal feminism, have led to an assumption that women are now economically equal to men, and either retain or can readily reacquire financial independence after relationship breakdown despite being more likely to be primary carers within the family. This section is a reminder of some of the evidence that contradicts this assumption.²⁷ In so doing, it seeks to show why there is a need for greater realism in the evaluation of what the law can achieve when the parties' actual financial positions limit their, and the court's, room for manoeuvre.

Men's and women's employment

There is certainly a reducing gap in employment rates between women with and without dependent children, down from 5.8 percentage points in 1996 to 0.8% in 2010.²⁸ But in 2017, of people aged 16 to 64 years with dependent children, the

²⁵ A Spence, *Social Trends 41, Labour market* (ONS, 2011) pp 6-7; ONS, *Female employment rate LF25* and *Male employment rate MGSV* (ONS, 2017): 2016 data. Note that economic data sometimes refer to the United Kingdom, and sometimes to England and Wales depending upon the source.

²⁶ H McCarthy 'Social Science and Married Women's Employment in Post-War Britain' (2016) 233 *Past and Present* 269, 269-270.

²⁷ For data (albeit relating to 1990-2008) on how men and women adjust financially to divorce, see H Fisher and H Low, 'Recovery from Divorce: Comparing High and Low Income couples' (2016) 30 *Int J Law, Policy and the Family* 338. They find that 'Women in the highest income households before divorce suffer the largest and most persistent falls in their standard of living compared to those from the lowest income households, who recover quickly. Men increase their standard of living on divorce: low income men recover the most and recover fastest, partly driven by returning to live with their extended families. Across the income distribution, there is no evidence that women are more likely to remain in the marital home than men after divorce, with the majority of men and women moving house on divorce.'

²⁸ Spence, above n 25, 7.

employment rate for married or cohabiting men was 93.6% and for women, 75.8%. By contrast, the disparity in employment rates between men and women without dependent children was much smaller, at 73.6% for men compared with 69.6% for women.²⁹ The data therefore show that the presence of dependent children still has a significantly greater effect on women's ability or propensity to take paid work than on men's, a factor that must be borne in mind when considering how parents are to support themselves and their children following divorce.

The age of the child and the presence or absence of a partner also make a considerable difference to women's employment rates. In 2013 in the United Kingdom, 65% of married or cohabiting women with a dependent child aged under three were in employment compared with only 39% of such women without a partner. Amongst lone mothers whose youngest child was of primary school age, 61% were working, compared with 74% of mothers with partners.³⁰ In considering the application of the current law, and the shape of any legal reform, then, the cost of child care, both directly but also in terms of lost opportunity for employment and career advancement, needs to be considered when calculating the losses incurred on divorce.

The pay gap that exists between men and women is a further factor to consider when seeking a realistic picture of the extent to which employment might provide women with financial independence after divorce. The gender pay gap in the UK has only been calculated systematically since 1997.³¹ It has narrowed

²⁹ ONS, *Working and workless households in the UK: October to December 2017* (2018) www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/workingandworklesshouseholds/octobertodecember2017#employment-rates-by-parental-status. The lower rate for women *without* dependent children probably reflects the age range – women were able to take the state pension at a younger age than men, with the age being equalised over time between 2011 and 2018: see ONS, 'Women in the labour market: 2013' (ONS, 2013) p 4.

³⁰ ONS, 'Women in the labour market: 2013', pp 8-9. The data do not distinguish between divorced, separated or never-together lone parents.

³¹ See DCMS, *Secondary Analysis of the Gender Pay Gap: Changes in the Gender Pay Gap over Time* (2014) www.gov.uk/government/uploads/system/uploads/attachment_data/file/295833/Analysis_of_the_Gender_Pay_Gap.pdf, 6.

to an extent, from around 25% then, to just under 20% in 2016.³² Taking full-time workers only, who are more likely to include women earning higher salaries, the gap was around 10% in 2016, compared with just under 20% in 1997.³³ However, analysis by the Institute for Fiscal Studies (IFS) found that, between 1991 and 2008, the gap between male and female hourly earnings grew steadily in the years after parents had their first child, reflecting the mother's likelihood of giving up work for a time, or moving to part-time employment. The IFS suggest that this reduces women's labour market experience, so that women's lower earnings are a reflection not just of lower pay, but also of reduced earning potential.³⁴

Child care and housework

Since a key reason women's earnings are lower than men's lies in their caring responsibilities, it is necessary to consider how far the breadwinner/housewife model still governs the division of household labour and the performance of care work in the United Kingdom. From the 1950s, when housewives reported 15-hour days spent on housework and child care,³⁵ the number of hours devoted to such work has declined significantly, not least because everyone does less housework and the tasks themselves are easier to do. But women still undertake the bulk of domestic care work and the position has been summed up as follows:

The overall story is that there has been very little change over the past two decades in the percentage of couple households dividing household responsibilities along traditional gender lines ... it was the case in 1994 and remains the case in 2012 that, to differing degrees, women are much

³² Officially defined as the difference between men's earnings and women's earnings as a percentage of men's earnings. This and following data taken from ONS, *Annual Survey of Hours and Earnings: 2016 provisional results* (2016) and accompanying tables www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/annualsurveyofhoursandearnings/2016provisionalresults#main-points.

³³ The picture for part-time working is more complicated. More women work part-time than men (41% and 12% respectively in 2016) and women are paid more on average than men, so that, taking the *median*, the gap has in fact switched from a very small bias towards male earnings in 1997 of 0.6%, to a negative pay gap, of -6% in 2016. However, the *mean* continues to show an advantage enjoyed by men, albeit reducing from 17% to 5.8%.

³⁴ M Costa Dias, et al, *The Gender Wage Gap*, IFS Briefing Note BN186 (Institute for Fiscal Studies, 2016) 12.

³⁵ D Kynaston, *Family Britain: 1951-57* (Bloomsbury, 2009) 584.

more likely than men to always or usually care for sick family members, shop for groceries, do the household cleaning and prepare the meals.³⁶

In relation to child care specifically, a study of 4,500 parents of children aged under 16 in 2008-9 found that overall, 74% of the parents were in paid employment, but this rose to 88% of fathers and fell to 63% of mothers; 83% of fathers were working full-time compared to just 27% of mothers. Fathers' hours were also significantly longer than those of mothers: 46% worked between 40-49 hours per week, while only a quarter of mothers did so.³⁷ The practical effect of this working pattern was that while only 29% of parents *believed* that primary responsibility for child care rests with the mother,³⁸ three-quarters of mothers (and around 55% of fathers) reported that the mother in fact had primary responsibility.³⁹ Moreover, the primary responsibility for child care was in fact performed by another family member such as a grandparent in 24% of father-headed lone parent families, compared with just 9% in lone-mother families.⁴⁰ The assumption that very young children should be cared for by mothers, and a preponderance of fathers working full-time, continued to govern many parents' arrangements – 52% of mothers reported caring for a pre-school child during the week, compared with 18% of fathers.⁴¹ Indeed, the British Social Attitudes Survey found that 'while attitudes that there should be a clear gender divide – with male breadwinners and female home-keepers – have been almost eradicated', 69% of respondents thought the best arrangement for caring for pre-school age children was for the mother either to be at home (31%) or to work part-time (38%) while the father works full-time.⁴²

³⁶ J Scott and E Clery, 'Gender Roles' in A Park et al (eds), *British Social Attitudes 30* (NatGen, 2013) 127.

³⁷ G Ellison et al, *Work and care: a study of modern parents* Research Report: 15 (EHRC, 2009) 34 and Table 5.

³⁸ Ibid, Figure 1.

³⁹ As is common in surveys of this kind, parents often had different impressions of the extent to which care is shared – 31% of fathers believed that they shared responsibility with the mother, while only 14% of mothers did so: *ibid*, Figure 7. See also Scott and Clery, above n 36, Table 5.5 on housework.

⁴⁰ Ellison et al, above n 37, 35-36.

⁴¹ Ibid, Figure 9.

⁴² Scott and Clery, above n 36, p 121 and Table 5.3.

Finally, women's pensions in retirement and old age are significantly lower than those of men, reflecting their poorer pension accumulation during shorter working careers at lower levels of earnings. There was a 39.5% gender *pension* gap between men and women in the United Kingdom in 2014,⁴³ and for those planning to retire in 2017, the gap had widened to 45%.⁴⁴ Private (ie non-state) pensions have become a very significant source of income in retirement in the UK, with 79% of retired households⁴⁵ in 2015/16 having some private provision. This makes a very significant difference to standard of living within retirement: these households had an average disposable income nearly twice as high as those without.⁴⁶ Yet Hilary Woodward and Mark Sefton, in their study of pensions on divorce, found that divorcing wives commonly trade current security, particularly in relation to a home for them and any children, in exchange for forgoing a share of the husband's pension.⁴⁷ Provision of pension rights and fair allocation of pension assets on divorce need to be factored into shaping any reform of the law.

Location, location, location?

Income levels vary widely in the United Kingdom. The *median* equivalised household disposable income was £26,300 pa in 2015/16, but the top fifth of households, those perhaps more likely to be troubling the family courts in financial remedies proceedings and certainly more likely to feature in the law

⁴³ That is, is the percentage by which women's average pension is lower than men's; D-G for Internal Policies, Policy Dept C, Citizen's Rights and Constitutional Affairs, *The gender pension gap: differences between mothers and women without children* (European Parliament, 2016), Table B1
[www.europarl.europa.eu/RegData/etudes/STUD/2016/571363/IPOL_STU\(2016\)571363_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571363/IPOL_STU(2016)571363_EN.pdf).

⁴⁴ Prudential, 'Class of 2017', annual survey of 1000 people expecting to retire, reported at www.thisismoney.co.uk/money/pensions/article-4643966/Women-s-pension-income-trails-men-s-6-400-2017.html 29 June, 2017.

⁴⁵ A retired household is defined as one where the combined income of retired members accounts for the majority of the total gross income of the household: ONS, *What has happened to the income of retired households in the UK over the past 40 years?*
www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/articles/whathashappenedtotheincomeofretiredhouseholdsintheukoverthepast40years/2017-08-08).

⁴⁶ Ibid.

⁴⁷ H Woodward with M Sefton, *Pensions on Divorce: An empirical study* (Cardiff Law School, 2014) 139.

reports, had a disposable income of £62,400 compared to £12,500 for the bottom fifth. Looking at gross income (after cash benefits are included), the top 20% were six times wealthier than the bottom 20%, at £87,600 compared to £14,800.⁴⁸ Ninety per cent of those liable to income tax in 2015 had gross incomes below £51,400, and the gap even between the 'affluent and the fabulously rich'⁴⁹ widens significantly once one reaches these levels – the top 1% had gross incomes above £162,000 pa.⁵⁰

Moreover, these national figures mask significant differences across regions. The gross disposable household income (GDHI)⁵¹ for the whole of the United Kingdom in 2015 was £19,106 per head. The figure for England was £19,447; for Wales it was £16,341; for London it was £25,293. Of the top ten areas in the country, five were in London, the rest in the south east of England; the bottom ten areas were in the Midlands and North of England.

These differences are compounded when gender is factored in. If one takes gross weekly earnings as a more useful indicator, the UK average (mean) was £644 in 2016, breaking down to £698 for men, and £562 for women.⁵² The figures for England were £652, £709 (men) and £566 (women) respectively, and for Wales, they were substantially lower, at £566, £601 (men) and £516 (women). In

⁴⁸ ONS, *Household disposable income and inequality in the UK: financial year ending 2016* (2017), www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/incomeandwealth/bulletins/householddisposableincomeandinequality/financialyearending2016. Figures are all medians.

⁴⁹ *Re P (Child: Financial Provision)* [2003] EWCA Civ 837 [2003] 2 FLR 865.

⁵⁰ HMRC, 'Percentile points from 1 to 99 for total income before and after tax' (2017), <https://www.gov.uk/government/statistics/percentile-points-from-1-to-99-for-total-income-before-and-after-tax>.

⁵¹ ONS, *Regional gross disposable household income (GDHI): 1997 to 2015* (2016), www.ons.gov.uk/economy/regionalaccounts/grossdisposablehouseholdincome/bulletins/regionalgrossdisposablehouseholdincomegdhi/2015 and note p 4: 'Total GDHI estimates in millions of pounds (£ million) are divided by the resident population of a region to give GDHI per head in pounds (£). Per head data take account of the entire resident population of regions, sub-regions and local areas. The working population and the economically inactive are included therefore GDHI per head are estimates of values for each person, not each household. This can be a useful way of comparing regions of different sizes'.

⁵² <https://stats.wales.gov.wales/Catalogue/Business-Economy-and-Labour-Market/People-and-Work/Earnings/medianweeklyearnings-by-ukcountryenglishregion-year>. Median figures were £539, £578 and £481 respectively. <https://www.gov.uk/government/news/uk-house-price-index-hpi-for-june-2017>

London, the figures were £832, £923 and £706.⁵³ It is not surprising that, given these differences, local courts will arrive at different solutions to dividing up limited assets and earnings at the end of a marriage, indeed, there would be something very wrong with the law if they did not do so.⁵⁴ The legislation and judicial guidance on its interpretation therefore have to be workable and fair across very different local conditions.

Property costs

This point is emphasised finally by the way that regional variations in income are reflected in the value of housing and the cost of rent in different areas. In London, the average property price is nearly £0.5 million, compared with £240,325 for England and £151,672 in Wales.⁵⁵

When coupled with the different earnings levels for men and women in the different parts of the country, the extent to which even an outright transfer of a husband's interest to the wife would enable her to preserve the former matrimonial home for herself where she has the greater need for it – usually as primary carer of any dependent children of the parties – is limited in the everyday case. The cost of a mortgage ranged in 2017 from around £650 per month for a property worth £152,000 (the average price in Wales) to £2000 for the average in London.⁵⁶ It is very unlikely that a wife on average female earnings would be able to afford these instalments in London, so preserving the home is really only feasible there where there is a very substantial equity in the

⁵³ Ibid. Median figures for England were £544, £585 and £483; for Wales, £492, £525 and £449; for London, £671, £733 and £610, respectively.

⁵⁴ Although there is a view that regional disparities in outcome might reflect ideological differences amongst judges, and lead to forum shopping: see Law Commission, *Matrimonial Property, Needs and Agreements* Law Com No 343 (2014), paras 2.45-2.53. There is a need for nuanced research to check this. For a first attempt, see Miles and Hitchings in this special issue, and in more depth Hitchings and Miles 'M&S or Savile Row? Rules versus discretion in financial remedies on divorce', forthcoming.

⁵⁵ £481,556: see www.gov.uk/government/news/uk-house-price-index-hpi-for-june-2017.

⁵⁶ Source: www.moneysavingexpert.com/mortgages/mortgage-rate-calculator#results repayment mortgage, 3% interest for 25 year term. I have assumed a 90% loan with 10% deposit. There is a similar differential in rental cost depending upon location: Valuation Office Agency, *Private Rental Market Summary Statistics – April 2016 to March 2017* (2017) <https://www.gov.uk/government/collections/private-rental-market-statistics#2017> Chart 1 (England); Welsh Government, *Private sector rents for Wales, 2016* (2017) <http://gov.wales/docs/statistics/2017/170411-private-sector-rents-2016-en.pdf> Table 1 (Wales).

property which might negate or reduce her need for a mortgage.⁵⁷ This might come about because of the length of the marriage, or because the wife brought significant equity into a short marriage (perhaps as the product of a divorce settlement from an earlier union) and it is decided, given her 'needs', that this justifies her retaining the whole or lion's share. But even with much lower property prices in Wales, a woman's likely lower income makes it more difficult for her to sustain a mortgage. If the home is to be preserved, or a similar home acquired, then continuing periodical payments by the husband might be thought to be necessary – but for many husbands, they are simply unaffordable, especially if there are dependent children to support as well.

These data show that the everyday divorce is difficult to finance in both wealthy and poorer parts of England and Wales, even though the case is based on meeting 'need' rather than on 'sharing'. And they demonstrate that any move to a presumption of *equal* sharing of the equity (as the Deech Bill would prescribe)⁵⁸ would not provide enough capital to make either preserving the former matrimonial home (say, for an elderly wife or a primary carer of dependent children) or rehousing without significant downsizing and/or moving to a cheaper area a feasible option. It might well be that 'equal misery', with both spouses (and any children) moving to inferior accommodation, is the fairest outcome, but even that must ensure that both parties are in a position to finance their ongoing housing needs. Given women's unequal economic position, that is likely to require some rebalancing or redistribution of the available capital, and/or continuing support through maintenance – bringing us back to the question of whether these would be affordable by the husband.

⁵⁷ Some financial help to meet mortgage interest (known as 'SMI' – support for mortgage interest) is available through the social security system, but changed from a benefit to (a further) interest-bearing loan from April 2018: www.gov.uk/support-for-mortgage-interest/overview.

⁵⁸ The Deech Bill does contemplate unequal sharing where this would be fair, having regard to the needs of any children under the age of 21: cl 4(5)(c), but it would remain for the case law to determine when their needs would make this 'fair'. Compare the view in insolvency law that children's needs do not justify postponing sale to realise assets for the benefit of the creditors, unless there are special circumstances: *Re Haghghat (A Bankrupt)* [2009] EWHC 90 (Ch) [2009] 1 FLR 1271.

Legal guidance

What guidance can be gleaned from the legislation and case law regarding how to get a quart out of these pint pots? First, we know that the rhetoric of autonomy⁵⁹ has driven a trend towards clean break division of assets on divorce,⁶⁰ which chimes with notions of ‘fairness’ and the desire of ex-spouses to ‘move on’ from failed relationships. However, as the above discussion has shown, this approach is unlikely to address the economic inequality between many spouses. Moreover, the stress laid on giving primacy to meeting need in the leading cases does not descend into anything like a sufficient level of practical grinding detail. It is true that very helpful non-judicial guidance can be found in two sources, the Family Justice Council’s *Guidance on ‘Financial Needs’ on Divorce*⁶¹ and the equivalent for lay people, Advicenow’s *Survival Guide to Sorting out your Finances when you Divorce*.⁶² But although these set out and explain the law very well, they do not, and cannot, go beyond suggesting appropriate ways in which the parties might deal with their affairs.

The case law conundrum

The flexibility of the broad discretion enshrined in the 1973 Act is likely to have become increasingly unwieldy as the cost of legal support (in the form of both the advice of lawyers and the endorsement of the courts through the making of orders) has been put beyond the reach of more and more litigants.⁶³ Emma Hitchings went some way to trying to shed light on the ‘everyday case’ some years ago, and has written on the limited extent to which what she terms ‘official justice’, as distinct from ‘operative’ or ‘outsider’ justice – settlements reached with little or no access to expert advice and assistance – is now a feature of the family ‘justice’ system.⁶⁴ My concern here, however, is to note the kind of

⁵⁹ See A Diduck, ‘What is Family Law For?’ (2011) *Current Legal Problems* 287.

⁶⁰ Evident in Miles and Hitchings’ data, in this special issue.

⁶¹ (2016) www.judiciary.gov.uk/wp-content/uploads/2013/04/guidance-on-financial-needs-on-divorce-june-2016-2.pdf

⁶² (2017) www.advicenow.org.uk/guides/survival-guide-sorting-out-your-finances-when-you-get-divorced

⁶³ Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) ss 9, 10, Sch 1, Part I.

⁶⁴ See E Hitchings, ‘Official, operative and outsider justice: the ties that (may not) bind in family financial disputes’ [2017] *CFLQ* 359.

guidance that the courts are giving through case law, and to contrast that with the range of economic circumstances in which divorcing couples find themselves.

It is trite that neither the mass media nor the law reports provide a reliable picture of the divorcing population. This may not be a problem of fake news, but it is a consequence of the media seeking out the newsworthy, and of the non-use of the courts (or their use limited to the obtaining of consent orders) by the majority of those who divorce.⁶⁵ The result is that, in a system where the cases already provide limited 'authority' because of their fact-specific nature, the guidance that the courts are able to give is becoming increasingly specialised, esoteric and, frankly, irrelevant.

One should not over-state the extent to which the generation of family jurisprudence has become the preserve of the wealthy litigant. As long ago as the 1980s, the courts were establishing key principles in cases involving the very well-off.⁶⁶ Nonetheless, to take the most recent 40 cases concerning some aspect of financial remedies reported in the *Family Law Reports*,⁶⁷ of which 29 provide information about the value of the assets in dispute, only one involves a relatively insignificant sum of £87,000 in respect of a pension policy.⁶⁸ After that, the lowest sum mentioned is £1.5 million⁶⁹ and the highest £219.5 million.⁷⁰ Some of the cases where figures are not given may well have involved assets below the lower sum, but these turn on points of jurisdiction, procedure, or variation of older orders which now require re-examination.⁷¹ As far as

⁶⁵ The lack of resort to court to endorse financial settlements on divorce has been noted for many years: see eg C Barton and A Bisset-Johnson, 'The Declining Number of Ancillary Relief Orders' [2000] *Fam Law* 94 and A Perry et al, *How parents cope financially on marriage breakdown* (Family Policy Studies Centre, 2000).

⁶⁶ See eg *Preston v Preston* [1982] Fam 17, CA: husband's assets worth £2.3m, wife awarded £600,000.

⁶⁷ In volumes [2016] 2 FLR, [2017] 1 FLR, [2017] 2 FLR.

⁶⁸ *Goyal v Goyal* [2016] EWCA Civ 792, [2017] 2 FLR 236. The husband had, however, lost some £500,000 through gambling. The parties had engaged in 'acrimonious litigation involving no fewer than 65 court orders'.

⁶⁹ *Velupillai v Velupillai* [2015] EWHC 3095, [2016] 2 FLR 681.

⁷⁰ *Robertson v Robertson* [2016] EWHC 613, [2017] 1 FLR 1174.

⁷¹ See eg *Ramadani v Ramadani* [2015] EWCA Civ 1139, [2016] 2 FLR 1233 (spousal maintenance order made in Slovenia); *Aburn v Aburn* [2016] EWCA Civ 72, [2017] 1 FLR 72 (attempt to fix future upward variation of periodical payments order).

guidance, in the shape of principles and their application, is concerned, there appears to be a yawning gap between the 'everyday' case and the reported case.

There is an important exception that might seem to prove this rule: *Birch v Birch*.⁷² This case is not a big money case, although the judgment does not actually mention the value of the property in issue (perhaps because the parties did not agree on this).⁷³ It in fact epitomises the problem of the failure to set out principles or their application in the everyday case in current jurisprudence. The wife had given an undertaking to have the husband released from the mortgage on the matrimonial home, or, if this were not possible, to sell the home by a certain date. Having failed to have him taken off the mortgage, she applied to 'vary' the undertaking so that the sale could be postponed until their younger child had completed school – seven years after the original deadline. The case turned on whether the court had jurisdiction to release her from the undertaking,⁷⁴ and the Supreme Court finally concluded that it does. The case was remitted to determine whether the jurisdiction should be exercised or not. But it is precisely that question which raises an important issue of principle: whether ensuring that a clean break settlement will be put into effect outweighs the need for flexibility and the requirement to give 'first consideration' to the welfare needs of the children. Insofar as the majority remitted the case for the first instance judge to exercise his or her discretion, an answer of sorts was given, but only Lord Hughes, in his dissent, squarely addressed the matter at the level of principle.

There is a possibility that the Supreme Court will provide a definitive answer to this question and take the opportunity to elucidate the principles underpinning the assessment of 'needs' in *Mills v Mills*,⁷⁵ which is to be heard during 2018. The

⁷² [2017] UKSC 53, [2017] 2 FLR 1032.

⁷³ It does indicate the size of the mortgage the husband had been told he might be able to obtain: £180,000 if he were otherwise mortgage-free, but only £117,000 whilst he was bound by the mortgage on the former matrimonial home.

⁷⁴ Rather than to 'vary' it.

⁷⁵ *Mills v Mills* [2017] EWCA Civ 129, [2017] Lexis Citation 49. In *Waggott v Waggott* [2018] EWCA Civ 727, the Court of Appeal did discuss the principles underpinning the importance of the clean break, but the case involved several £millions and fails therefore to shed light on (indeed, potentially obscures) how this should be applied to the everyday case.

parties agreed through a consent order that the wife would receive the bulk of the equity in the family home, plus ongoing periodical maintenance payments. The husband later sought a downward variation or termination of the payments and the wife an upward variation. The judge found that the wife had made unwise investments of the capital she had been awarded, and he declined to increase her periodical payments even though he found that they did not meet her needs; he also refused the husband's application to lower or terminate them. The Court of Appeal allowed the wife's appeal on the basis that the judge had failed to explain why he had not increased her maintenance given that he had concluded that she could not live on the amount ordered or on her income through employment. The Supreme Court agreed to hear the husband's appeal on the question of whether, provision having already been made for the wife's housing costs in the original settlement, the Court of Appeal erred in taking the wife's housing costs into account when increasing her periodical payments. This case at least provides the opportunity for the Court to reflect on the balance between finality and flexibility in a case involving a couple who are not super-rich and to give guidance that can assist in negotiating settlements in such cases.

Does it matter that the jurisprudence does not generally apply to poorer families? It is asserted that marriage has declined most amongst the working-class, so that one could argue that they are not much affected by the divorce jurisdiction anyway,⁷⁶ and Fisher and Low found that lower-income divorcees recover more quickly from divorce than the better-off.⁷⁷ While published ONS data do not analyse the marriage rate by socio-economic class, John Ermisch and Mike Murphy have found that less-educated women (education being a proxy for social class) have higher rates of cohabitation and extra-marital birth.⁷⁸ Chris Belfield et al have also found that men born to poorer parents have a higher (and increasing) chance of being never married by their 40s.⁷⁹ But they have higher

⁷⁶ See eg Social Policy Justice Group, *Breakdown Britain: The state of the nation report: fractured families* (London, Centre for Social Justice, 2006) 97.

⁷⁷ Fisher and Low, above n 27.

⁷⁸ J Ermisch and M Murphy, *Changing household and family structures and complex living arrangements* (ESRC, 2006).

⁷⁹ C Belfield et al, *Intergenerational income persistence within families* IFS Working Paper W17/11 (Institute for Fiscal Studies, 2017) Appendix Table A1.

rates of divorce too,⁸⁰ and one could conclude that the need for guidance amongst the less well-off is greater, not less, when there are limited assets to share. And one can be quite high up the economic ladder and still have relatively little to share and stretch when it comes to divorce.

MARRIAGE AS A JOINT ENTERPRISE SHARING LOSSES AS WELL AS GAINS

After over 40 years, then, it seems that it might be time to rethink the current legislative scheme in England and Wales, and to arrive at an approach which better reflects the nature of modern marriage and the fact that a large proportion of divorcing spouses will need to settle their financial affairs with a minimum of legal advice or intervention. To do so, the law must be in tune with current economic realities and social attitudes, so that the guidance it lays down goes with the grain of family behaviour and will be understood, accepted and adopted by those to whom it is addressed.

Marriage and divorce in the 21st century

It is commonly asserted that modern marriage is a partnership of equals.⁸¹ This, of course, is an important corrective to the traditional patriarchal view of marriage. But while it indicates how the parties are to be viewed vis-à-vis each other it says nothing about the purpose of their relationship. I suggest that marriage as it is lived now should be conceived more as a 'life plan':⁸² a form of 'joint enterprise', in which both spouses make equally valued, though potentially different, contributions to the welfare of the family, as part of the collective endeavour or project of agreeing to share their lives and to develop a joint life-style. This model can be seen as reflecting a post-modern variant of breadwinner/housewife marriage, consequential upon the economic factors outlined above, whereby men often remain the primary breadwinners and women assume a dual role of 'mother' and subsidiary worker. In this model, one

⁸⁰ Ermisch and Murphy, above n 77, p 12; Belfield et al, ibid Table A2.

⁸¹ See eg *Miller; McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [16] (Lord Nicholls), 141 (Lady Hale); *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246, [115] per Sir Mark Potter P.

⁸² See J Eekelaar, *Family Law and Personal Life* (2006) 50, discussing 'friendship plus'.

spouse (currently usually the wife) may give up the opportunity to make a full *financial* contribution to the family through her career or employment, by concentrating on child care and home-making for a period during the marriage – as in *McFarlane v McFarlane*.⁸³ Or a spouse may simply be unable to contribute as much financially as the other, because of lesser earning ability, pay differentials in the labour market, or a poorer family background so that she or he cannot bring an inheritance into the family. As Lord Nicholls made clear in *White v White*, this does not mean that this spouse's contribution is to be regarded as 'worth' any less than that of the bread-winning or wealthier spouse. But what was not followed through in *White* (where the wife's award of 40% of the assets was not increased) nor in *McFarlane* (where the wife's periodical payments were set at one-third of the husband's income), is that if there is to be substantive equality of *outcome* between the parties as they go their separate ways, then any economic imbalance between them resulting from the choices and actions they take during the relationship must be redressed to ensure that neither party is unfairly disadvantaged after the marriage ends.

A partnership of equals model, by contrast, fits a view of marriage as a matter of formal equality where the autonomy of each 'partner' is the primary feature.⁸⁴ An implicit drawback of this model is that it sees marriage as akin to a business partnership intended to deliver a profit, which will be divided between the spousal shareholders if it is wound up prematurely. This view has been reinforced by the increasing emphasis of financial remedies law since the 1980s on the allocation of property on divorce and achieving a clean break between the parties after the end of the marriage, rather than on a continuing liability to provide maintenance for the dependent ex-spouse. This has meant that the purpose of the divorce jurisdiction has come to be seen as being to divide the marital acquest with a focus on *gain*, rather than recognising that, for at least 90% of the population, the ending of marriage represents a financial as well as emotional *loss* and potentially ongoing financial disadvantage. I want to suggest instead that we should explore reviving the notion of a remedial family law

⁸³ [2006] UKHL 24, [2006] 2 AC 618.

⁸⁴ See Diduck, above n 59.

approach, which seeks not (only) to recognise the gains of a relationship but (also) to remedy the losses.⁸⁵ I suggest that this would fit the modern liberal individualist approach to marriage, just like a clean break settlement, by allowing adult parties at the end of their relationship to draw a line underneath it, but it would also give more scope to redress the economic imbalance that has arisen in consequence of its ending.

Such an approach would emphasise the fact that *both* the spouses willingly received the financial and non-financial benefits of their relationship while the marriage continued. Both parties gained from the marriage – or expected to do so. But ‘everyday’ divorcees are also both likely to have lost from the ending of the marriage and the question is how to share that loss fairly.

If this is kept in mind, then the law can be moved away from viewing the claimant as a dependant and supplicant, and the respondent as the partner who generated the wealth in the relationship.⁸⁶ Instead, it can be seen to be concerned with giving due recognition to the entitlements *each* party has accrued through the efforts they both made in their joint enterprise and with providing fair recognition of both the gains *and* the losses each has incurred.

But it should be noted that what is contemplated here is a focus on the disadvantage generated by *the loss of the relationship* and not simply ‘relationship-generated’ loss. A spouse suffers no particular economic disadvantage because of choices (or force of circumstances) during the marriage that may lead her to sacrifice career or earning opportunities *while the marriage continues happily*. To this extent, an ongoing marriage *is* a form of life assurance/insurance policy against ‘all hazards’, even if this is not so after

⁸⁵ See also M Weiner, ‘Caregiver payments and the obligation to give care or share’ (2014) 59 *Villanova Law Rev* 135, who, in the context of discussing how to compensate a primary carer for the ‘freeloading’ of the other parent who fails to ‘give care or share’, suggests that a court should award compensation according to whichever of gain, loss or contribution, would best produce a fair outcome between the parties. This requires a discretionary regime administered by a court and assumes the parties have legal representation, however, which is increasingly not the case in England and Wales.

⁸⁶ This seems to reflect decisions which allow for a ‘special contribution’ where one spouse has brought huge wealth into the family (see eg *Charman v Charman (No 4)* [2007] EWCA Civ 503. [2007] 1 FLR 1246) or the assets are regarded as ‘unilateral’ and therefore not part of a joint pool available for division (eg *Sharp v Sharp* [2017] EWCA Civ 408, [2017] 2 FLR 1095).

divorce.⁸⁷ The disadvantage arises when the marriage ends and the ex-spouse is now expected to support and house him or (more usually) herself, having failed (for whatever reason) to maximize the ability to do so during the marriage. It is thus the impact of the *ending of* the marriage, not the impact of the marriage itself, on the spouse's financial position, that should be the focus. An example of recognising such loss may be seen in the French *prestation compensatoire* which 'aims to compensate the disparity created *by the divorce* in the respective standard of living of each party'.⁸⁸

Such a remedial approach, which looks at what a spouse loses because of the *ending* of the marriage, can avoid the complexity of attempting to guess how far up the career ladder a wife might have reached but for the marriage, and the ignominy of a calculation that concludes that a wife with no career prospects came out ahead through her enjoyment of the lifestyle generated by the husband.⁸⁹ It also focuses on loss rather than need as the basis of any spousal obligation to make redress and thus provides an answer (partially, at least), to Mostyn J's question as to why 'after the dissolution of a marriage the law permits the imposition on a party of the obligation to pay spousal maintenance potentially until the death of the payee'⁹⁰ The 'imposition' is compensation for the loss now incurred by one spouse and recognition of the corresponding benefit previously accrued by the other party.

This approach might appear to have some similarity with the 'minimal loss' principle⁹¹ governing financial provision on divorce in England and Wales that was rejected in the 1980s. However, the difference is that it does not seek to enable the dependent spouse to continue to live as if the marriage had not

⁸⁷ Cf *North v North* [2007] EWCA Civ 760, [2008] 1 FLR 158, [32] per Thorpe LJ.

⁸⁸ Law Commission, *Matrimonial Property, Needs and Agreements: A Supplementary Consultation Paper*, Consultation Paper No 208 (2012) para 4.56, emphasis added.

⁸⁹ See C Rogerson and R Thompson, *Spousal Support Advisory Guidelines: The Revised User's Guide* (Ottawa, Dept of Justice, 2016) pp 5-6.

⁹⁰ *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [2015] 2 FLR 1124. For discussion of this issue, see J Miles, 'Principle or Pragmatism in Ancillary Relief: The Virtues of Flirting with Academic Theories and Other Jurisdictions' (2005) 19 *Int J Law Policy and the Family* 242.

⁹¹ Matrimonial Causes Act 1973, s 25(1) (as originally enacted). This required the court to seek so far as practicable to put the parties in the financial position they would have been in had the marriage continued.

broken down, as that principle mandated. Instead, the financial requirements of the spouses are to be satisfied only so as to enable both to exit the marriage so far as possible, as Baroness Hale declared, with ‘an *equal start* on the road to independent living’.⁹² That requires a comparison of how readily each can adjust to, bear and make good any losses consequent upon the end of the relationship – and these have to be identified and then quantified. In such a regime, there may be situations where there is *no* loss causally related to the ending of the marriage, or the loss is effectively the same for both spouses. For example, there might have been a short, childless marriage in which both carried on their employment as before and each spouse has maintained their prior capacity to support and house themselves. In such a case, living together (as spouses) might have enabled them both to enjoy a higher standard of living than they could afford singly, but with the abolition of the ‘minimal loss’ principle, there is no entitlement to expect that a spouse will enjoy the same standard of living after divorce.⁹³ The focus is instead on the allocation of any assets to enable the parties to ‘move on’ with any loss shared fairly.

IDENTIFYING REMEDIABLE LOSSES

The basic financial loss incurred on a divorce is the loss of the marital lifestyle that the parties’ joint enterprise was intended to produce and sustain. Loss of lifestyle can be symbolically, if not practically, represented by a presumption that the spouses’ assets should be shared equally. However, as is well-understood, this approach simply fails to compensate for the full extent of the loss as it bears on the financially weaker spouse, and fails to acknowledge the differential ability of the parties to recover from the divorce. Instead, half shares should mark only a starting-point⁹⁴ for the discussion that spouses need to have when determining how to manage the financial consequences of ending their marriage.

⁹² *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618 at [144], emphasis added. It may be that the Supreme Court’s ruling in *Mills v Mills* (above, text to n 74) will help clarify this difference.

⁹³ And see further below regarding remediable losses.

⁹⁴ See the discussion in *Charman v Charman (No 4)* [2007] EWCA Civ 503, [2007] 1 FLR 1246 at [65]-[67].

But it does not follow that the law should seek to compensate for *all* such loss, any more than insurance necessarily extends to 'new for old' replacement of goods, or life assurance to full maintenance of a former standard of living. There are three primary losses accruing at the end of the marriage that should be prioritised for remedial action – so far as possible – when a couple divorce. All of them are justified because of their practical importance and significance for the parties and their family, and they are the key issues that have to be resolved anyway in the everyday divorce. In order of priority, they are the loss of the marital home, the loss incurred by having to meet ongoing child care costs (incurred both directly, and indirectly through undertaking part-time employment or foregoing career advancement), and the loss of pension provision. These are all clearly losses that arise from the ending of the marital relationship itself, rather than from structural disadvantage caused by the way work and care are socially organised (as is the case with women's lower earnings, for example). Secondly, they can be quantified in terms of current and foreseeable requirements and cash values and do not require speculation as to potential loss or gain (as is the case with trying to determine loss of career opportunity, for example). Thirdly, in the everyday divorce, they represent the likely (indeed, the outer) limits of what the financially better-off spouse can afford to contribute to making good the other's loss, particularly where child support must also be taken into account. The focus of legal policy should be on developing a scheme, based on the cost of these losses, which enables spouses to arrive at a workable, and fair, settlement to enable them to move on from the divorce in the everyday case. And it should be recognised that it might not be possible to meet all of even these costs in a given case, and then, the priorities mean that meeting the need caused by loss of the former matrimonial home must (and in practice does) come first.

A home for both parties

The end of the marriage means the loss of the family home. A home, almost as much as children, represents a tangible outcome of the spouses' joint enterprise. It has long been recognised that securing accommodation for the parties and

their children is the most basic, urgent and serious need arising from relationship breakdown, and dealing with it features prominently in the Family Justice Council's guidance.⁹⁵ A reformed policy on this issue should overtly recognise, however, that compensating for the loss of the home is likely to exhaust the extent of most couples' available assets, including income and earning capacity.⁹⁶ The law should focus clearly and directly on how this task should be approached. One possibility would be to recognise the difficulty of being able to afford to purchase property where there is limited equity available to raise a deposit, and instead to use rental costs and a multiplier for the years of the marriage, plus any years of future child dependency, to reach a capitalised sum to which a spouse would be presumptively entitled. Depending upon local house prices, this might work out cheaper than purchasing. The sum required should be provided from a share of the available assets wherever possible, (although if necessary, and feasible, it could be done through periodical payments). This might well result in the bulk or all of the available capital assets being assigned to the financially weaker spouse, especially if she (commonly) is a primary carer, with the stronger spouse thrown back on (usually) his higher earning capacity to recover ground in the future. Parents who want to share care more or less equally might seek a different arrangement to ensure that each could provide a home for their children, but for many, this might simply be unaffordable.

Child care

The second major loss consequent upon the ending of the marriage is that caused by the provision of child care. This might have been met during the marriage from the spouses using their combined earnings to meet the cost of paid care, or from both taking shifts to care for the children, or from one spouse assuming the physical burden by giving up or reducing their employment. Losing the support of the other spouse both reduces the primary carer's earnings and

⁹⁵ See eg pp 29-31.

⁹⁶ *Birch v Birch*, above, demonstrates this: after the divorce, the husband had lived with a partner in her home and was now renting with another partner, having transferred his share of the beneficial interest in the marital home to the wife. The whole point of the wife's undertaking had been to seek to enable him to re-house himself with the aid of a mortgage.

earning potential going forward, and imposes a direct cost. Where the parties cannot (continue to) share physical care, the cost ought to be met so far as possible, either as a recognised aspect of child support, or possibly as a direct obligation owed to the primary carer by the other parent.⁹⁷ Under the UK's Child Support scheme as originally enacted in 1991, the notional costs of child care were recognised in the formula through inclusion of an element based on the primary carer's social security personal allowance. This, however, was criticised as indirect support for the carer, which might, in theory, be additional to any spousal maintenance and which could not be owed to a non-spouse for whom no duty of maintenance exists. And being notional, it did not reflect the actual costs incurred. Where the rationale is compensation for *loss* rather than provision of maintenance, the former objection does not apply. Given the limited resources available in most cases (especially where the higher earner probably lost out on the capital value of the former matrimonial home because this had to be mainly allocated to the primary carer), a notional amount is probably a more realistic reflection of what can and would be paid over.⁹⁸ Once again, it might have to be recognised that the full cost and loss simply cannot be met in the everyday case.

Pension

The third significant loss relates to a spouse's pension. It was noted earlier that women's pensions are significantly lower than those of men, reflecting their poorer pension accumulation during shorter working careers at probably lower levels of earnings. Women's longevity means that divorced wives are at significant risk of spending several years in relative poverty if they did not take steps to secure rights to their ex-spouse's pension at the time of divorce. Entitlement to a share of the pension is not problematic: a pension is a form of deferred pay or saving.⁹⁹ Thus, pension contributions made while the marriage was ongoing¹⁰⁰ can be viewed as sums that would otherwise have been at the

⁹⁷ See A Blecher-Prigat, 'The Costs of Raising Children: Toward a Theory of Financial Obligations between Co-Parents' (2012) *Theoretical Inq L* 179.

⁹⁸ For detailed explanation of the current child support scheme, see Lowe and Douglas, above n 2, pp 800-825.

⁹⁹ See eg *Martin-Dye v Martin-Dye* [2006] EWCA Civ 681, [2006] 2 FLR 901.

¹⁰⁰ It may be noted that Scottish law limits pension sharing to rights or interests accumulated during the marriage: see Family Law (Scotland) Act 1985 s 10(5) as amended.

disposal of the spouses as part of the joint enterprise of their marriage. Moreover, defined benefit pensions, and some defined contribution schemes, provide for a spouse/dependant on the pension member/policy holder's death. They can thus be seen as 'matrimonial' property (notwithstanding a common view by pension holders that they are 'unilateral', personal property) available as a means of meeting the significant loss that divorce may otherwise inflict.¹⁰¹ There is a strong need in England and Wales to clarify the courts' approach to assessing the value of pensions and what to do with them.¹⁰² The problem is significant not only because of the risk that poor decisions are being made by those who lack any legal advice and do not make use of the courts, who are, at best, offsetting the pension against other assets.¹⁰³ Even parties who do receive legal assistance may be making poor bargains given the complexity of pensions and lack of expertise amongst lawyers as to how to deal with them.¹⁰⁴

What about ongoing financial support?

It can be argued that the greatest loss caused by the ending of the marriage is the loss of the available income of the two spouses combined, to support the lifestyle they have enjoyed on a day to day basis, rather than in the form of capital assets. Although the 'needs, generously interpreted' of a spouse dependent upon a wealthy husband or wife, have been taken to extend far beyond subsistence or even luxurious comfort, the loss is potentially even more significant at the other end of the income scale because it may make the difference between 'just about managing' and sinking into real poverty. There are problems with attempting to compensate for this on an ongoing basis, however. First, and yet again, for a large proportion of divorcing spouses, it may be unaffordable and simply unrealistic. Secondly, it raises the question of the duration of payments. Thirdly,

¹⁰¹ It is useful to recall that the original Matrimonial Causes Act 1973, s 25(1)(h) made provision for the court to take account of the value of a pension or other benefit that, by reason of the divorce, a party would lose the chance of acquiring. The provision still refers to the loss of any 'benefit', while pensions are now specifically dealt with elsewhere in the Act.

¹⁰² See Pension Advisory Group (chaired by Francis J and HHJ Edward Hess), 'The Pension Advisory Group: developing guidance on pensions on divorce' [2017] *Fam Law* 869.

¹⁰³ Pension sharing must be *ordered* by a court so private settlement cannot allocate the pension.

¹⁰⁴ See R Taylor, 'Pensions on divorce: another witches' brew' [2017] *Fam Law* 163.

it undermines the principle of the clean break which most divorcing couples themselves favour.¹⁰⁵

The first problem – lack of affordability – needs to be recognised by policy makers, and the courts, in shaping orders allocating the available capital resources as imaginatively as possible and frankly recognising that there will be shortfalls and imbalances between the spouses. All that can be done is to try to share these *fairly*.

In relation to the question of the duration of ongoing support, assuming that marriage is not regarded as an open-ended insurance contract, support should be provided in order only to meet a relationship-generated loss. The usual examples of such relationship-related losses, of course, are child care responsibilities that limit earning capacity; reduction or lack of such earning capacity or financial wherewithal in old age due to time out of the labour market because of family responsibilities; and the need to have time to ‘adjust’ to independence. The first of these *is* a key cause of loss, which has already been discussed as justifying compensation (albeit of a notional amount in many cases). It will usually be time-limited except where a child has disabilities that will require the primary carer to provide long-term care. The second is also fundamental and has been listed as a priority above. It should be addressed, where possible, through pension sharing or attachment¹⁰⁶ alongside the provision of the state pension and benefits still available in the United Kingdom. The third loss caused by time needed for ‘rehabilitation’ or ‘adjustment’ would not usually apply to a childless spouse, and will only be feasible in better-off cases anyway, but opens up scope for speculation – what job or profession *might* the spouse obtain; how long will it take her to acquire; how far should a spouse be accepted as ‘unable’ to become financially self-sufficient because of her previous lifestyle or cultural expectations; and what if things go wrong?

¹⁰⁵ Except where there is no other way of meeting a spouse’s sharing entitlement because capital is lacking), as in *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618. See further Miles and Hitchings, in this special issue.

¹⁰⁶ Pension sharing is a division of the pension *rights* accumulated by the pension investor; pension attachment is the allocation of a portion of pension *payments*: see Matrimonial Causes Act 1973 ss 21A, 25B.

Traditionally, the English courts were wary of cutting off the possibility of a 'back stop' should a dependent ex-wife fail to 'adjust' to financial independence.¹⁰⁷ The assumption of autonomy that now permeates much of the debate has rendered this paternalistic approach less acceptable.¹⁰⁸ But it can be argued that compensation for this kind of potentially long-lasting financial disadvantage is the debt owed by the better-off spouse for the benefits he or she enjoyed during the marriage at the expense of the other party. In the small number of cases where the financial resources are available, then, it could justify periodical 'maintenance' to meet the spouse's unavoidable ongoing losses after – and due to – the divorce.

Nonetheless, in an individualistic society like England and Wales, where the tax and benefits system is geared to the individual (albeit with dependency additions) rather than the family unit, where there is no effective limitation on spouses (and parents) forming and re-forming their own preferred family units, and where increasing numbers of couples do not marry or civilly partner anyway, it does not seem wrong to seek to encourage financial self-sufficiency after a marriage has ended, so long as this does not cause undue hardship.¹⁰⁹ For the wealthy divorcing couple, the share of capital (if necessary, potentially unequally) should generally provide an adequate 'cushion' for a spouse to adjust to financial independence.¹¹⁰ For a less well-off couple, there will not be enough capital or income to provide much of a cushion anyway. It is no accident that spousal periodical payments orders are becoming increasingly rare.¹¹¹

¹⁰⁷ *Flavell v Flavell* [1997] 1 FLR 353, CA.

¹⁰⁸ *D v D (Financial Provision: Periodical Payments)* [2004] EWHC 445 (Fam), [2004] 1 FLR 988; *L v L (Financial Remedies: Deferred Clean Break)* [2011] EWHC 2207 (Fam), [2012] 1 FLR 898.

¹⁰⁹ As provided in s 25A(2) where courts are considering whether to impose a deferred clean break settlement. See Mostyn J in *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [2015] 2 FLR 1124, [28]: 'A term should be considered by the court unless the payee would be unable to adjust without undue hardship to the ending of the payments. This suggests that Parliament anticipated that a degree of not undue hardship in making the adjustment is acceptable.'

¹¹⁰ Absent a *McFarlane*-type case: see above n 104.

¹¹¹ In one recent sample, under 2% of 369 cases involving financial remedies orders included open-ended spousal periodical payments for more than purely nominal amounts: Woodward with Sefton, above n 20, p 23; see also Fisher and Low, above n 27, pp 357-360 and Miles and Hitchings, in this special issue.

‘Maintenance’ of a spouse not linked to childcare costs or pension deficiency, has, one must conclude, become a luxury that is no longer needed by most better-off spouses, and is simply unaffordable for most of the rest. It does not follow that it should never be provided in the rare, suitable case,¹¹² but it should be regarded as the last resort and not the default.

A duty to mitigate?

I have suggested that it is the losses caused by the divorce that should be compensated, rather than the losses caused by the marriage itself. But it is usual to expect those seeking compensation for losses to mitigate these so far as is reasonable. We do not encourage a wife to assert that, although perfectly capable of supporting herself, she would rather sit back and be an ‘alimony drone’ at her ex-husband’s expense. However, in the English system, the courts have declined to allow marital misconduct to be used as a bargaining chip or relevant factor in financial settlement, unless it would be ‘inequitable’ to disregard it.¹¹³ Does a focus on ‘loss’ mean that this stance should be revisited? Should a spouse who appears to have broken up the marriage be permitted to claim for the losses incurred as a result of the divorce, that she herself has brought about? Since the basis for divorce in English law is irretrievable breakdown, not fault or blame, the answer has to be no. Simply because a spouse is a respondent, it does not follow that she or he is ‘to blame’ for the divorce – we all know that both parties are likely to have contributed to the failure of the marriage. Moreover, a petitioner may choose to end the marriage because of domestic abuse, or other ‘behaviour’ which he or she cannot reasonably be expected to live with. The law declines to investigate the ‘true’ ‘causes’ of the breakdown, and it is likely that it will catch up with other jurisdictions and move to a pure no-fault basis in the foreseeable future.¹¹⁴ So the ‘blameless’ spouse who finds him- or herself divorced without consent has no redress in the long-term (although he or she

¹¹² One could imagine, for example, the childless spouse who follows the other to a posting overseas where (usually) she is unable to earn a full living, and who then returns to this country too old to re-enter the labour market at more than a subsistence level.

¹¹³ *Wachtel v Wachtel* [1973] Fam 72; Matrimonial Causes Act 1973 s 25(2)(g) as amended.

¹¹⁴ For recent research on reliance on ‘fault’ facts to establish irretrievable breakdown, see L Trinder et al, *Finding Fault: Divorce Law and Practice in England and Wales* (2017, Nuffield Foundation). For the latest attempt to introduce further ‘no fault’ provisions into the law, see the No Fault Divorce Bill 2015-16, a private member’s bill which did not make progress.

can currently delay the divorce for up to five years¹¹⁵). For the everyday divorcing couple, both spouses are likely to lose out financially. Where the result has to be an unequal division of the limited assets because of the factors discussed above, then, in the age of the clean break and after the abolition of the minimal loss principle, it would be better to accept that the marriage was a poor investment *for both of the spouses* which has resulted in a financial loss – but it is a loss that the spouse who is better-placed economically can bear more easily than the other.

CONCLUSION

A reformed system requires a straightforward way of quantifying the losses of divorce. This article has criticised the courts for failing to provide sufficient guidance to help with this, and has sought to show that a strong presumption in favour of equal shares is too crude a means of redressing the imbalance of loss between the spouses. But any model of compensation and allocation must command the support of divorcing couples as a rational, fair and comprehensible one. This is all the more so when – as appears to be becoming increasingly common – they have to work out for themselves what arrangements they should make on divorce.¹¹⁶ So along with the kinds of data on economic and financial factors summarised in this article, I suggest that robust attitudinal research is a prerequisite before any reform is enacted. There will undoubtedly be divisions of opinion, particularly based on gender, in reaching conclusions on the appropriate criteria and the extent and nature of reform. But the views of the judiciary, the Law Commission, the House of Lords, legal academia and even much of legal practice are likely predominantly to reflect a mind-set shaped by a jurisprudence and litigation focused on the wealthy. It would be unwise to assume that such views will ensure that the law reflects the essence of marriage

¹¹⁵ See the last basis for divorce prescribed by the Matrimonial Causes Act 1973, s 1(2)(e).

¹¹⁶ The proportion of divorce (including financial remedies) cases where neither party was represented rose from 7% to 9.6% between 2011 and 2016, while the proportion where both were represented fell from 53% to 45%. Cases where only the applicant was represented rose from 35% to 42% while those where only the respondent was represented remained around 4-5%: MoJ, *Family Court Statistics Quarterly January to March 2017* (2017) Table 8. <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2017>.

as a joint enterprise and adequately compensates for the losses of divorce across the financial spectrum.